

No. 15698 ✓

United States
Court of Appeals
for the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 36315

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation; WHITE COMPANY, a Corporation; FIRST DOE, and SECOND DOE,

Defendants.

PETITION FOR REMOVAL OF ACTION ON
GROUNDS OF DIVERSITY OF CITIZENSHIP

To the Honorable the Judges of the Above-Entitled Court:

Comes now States Marine Corporation of Delaware, a corporation, defendant in the above-entitled action, and files this, its petition for removal of said action from the Superior Court of the State of California in and for the City and County of San Francisco, in which it is now pending, to the United States District Court in and for the Northern District of California, Southern Division, held in the City and County of San Francisco, State of California:

1. The above-entitled action was commenced in the Superior Court of the State of California in

and for the City and County of San Francisco on March 8, 1957, the same being No. 466711, and is now pending in said court. Said defendant was served with a copy of the summons and complaint in said action on March 19, 1957, at San Francisco, California; that said action is one of which the District Courts of the United States have original jurisdiction.

2. That defendant States Marine Corporation of Delaware is a corporation organized and existing under and by virtue of the laws of the State of Delaware and was at the time of the commencement of said action and now is a resident and citizen of the State of Delaware and not a citizen of the State of California; that upon information and belief the plaintiff in this action at the commencement thereof was and still is a citizen and resident of the State of California; that upon information and belief as appears from the allegations set forth in paragraph II of plaintiff's complaint, all defendants named in said complaint are citizens of states other than California; that said action is of a civil nature, namely, an action for alleged damages for death alleged to have occurred on an American vessel in navigable waters of the United States.

3. That the matter and amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs.

4. That the controversy in this action is wholly between citizens of different states as aforesaid.

5. That your petitioner herewith files a bond with good and sufficient surety, conditioned that the defendant, States Marine Corporation of Delaware, will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that this cause was not removable or was improperly removed.

6. That attached to the original of this petition and made a part hereof is a full, true and correct copy of all records and proceedings in the Superior Court of the State of California in and for the City and County of San Francisco in said action.

Wherefore petitioner prays that this Honorable Court will cause said action to be removed from the Superior Court of the State of California in and for the City and County of San Francisco to the United States District Court in and for the Northern District of California, Southern Division, and that it will issue all necessary orders and process to bring before it all proper parties whether issued by the state court or otherwise.

GRAHAM, JAMES & ROLPH,

/s/ FRANCIS L. TETREAULT,
Attorneys for Petitioner.

Duly verified.

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 466711

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation; WHITE COMPANY,
a Corporation; FIRST DOE, and SECOND
DOE,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants and each of
them and for cause of action alleges:

I.

Plaintiff does not know the true names of defendants sued herein under the fictitious names of White Company, a corporation; First Doe, and Second Doe, and plaintiff prays leave to amend this complaint and insert herein said true names when the same shall have been ascertained.

II.

Plaintiff is informed and believes and therefore alleges that each and all of the defendants are corporations organized and existing under and by virtue of the laws of states other than the State of

California, but that said corporations have qualified to, and are doing, business in the State of California, and maintain principal offices and places of business therein, and particularly in the City and County of San Francisco.

III.

At all times herein mentioned the defendants did and now do own, operate, control and maintain the American vessel S.S. Lone Star State.

IV.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various long-shoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company to perform said work; that while and during the time said William J. Aldridge was performing said work aboard said vessel, he occupied the position of a seaman in that he was performing work traditionally of a seaman's character, and by reason thereof the defendants did owe to him the duty of providing a safe and seaworthy vessel, gear, equipment and appurtenances, and safe and seaworthy conditions of employment, including but not limited to the supervision and overseeing of his said work by an officer, to wit, the mate, of said vessel.

V.

Said William J. Aldridge did commence work as a longshoreman as aforesaid at approximately 7:00 o'clock p.m. of said day, and did continue his said work until approximately 2:00 o'clock a.m. thereafter; said work was performed in the No. 3 hold aft of said vessel; during the course of said work it was necessary from time to time for dunnage to be used therein, and for that purpose loads of dunnage, each weighing between one and two tons, consisting of large pieces of lumber of varying sizes and weights, strapped together by metal bands, were lowered into the said hold of said vessel; that at and shortly after the commencement of said work at approximately 7:00 o'clock p.m. of said day, the said William J. Aldridge and other longshoremen working together with him did request that they be supplied with band cutters or other means for breaking the said steel bands in order to free the pieces of dunnage so that said longshoremen could perform their tasks and duties in connection therewith, and said request was thereupon communicated to the defendants, including but not limited to the Port Captain employed by, and an officer of, said defendants, and a carpenter boss, likewise employed by the defendants; the defendants by and through their said agents, officers and employees did advise that no band cutters or other means or methods were available for cutting or breaking the said steel bands, but did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and method

provided by defendants to free said dunnage during the early portion of said work; that thereafter, when it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by said longshoremen were made through their foreman, supervisor and walking boss, but the defendants did fail to respond and did fail to provide or supply either persons or means by which the said bands could be cut or broken, and by reason thereof the only means and method remaining to said longshoremen by which such steel bands could be broken, was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the afore-said it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period of several hours, during all of which the defendants neither supplied any cutters, nor any persons to cut or break said bands, nor any officer of the vessel to oversee or supervise said operations, and in the course of such operations, at approximately 1:55 o'clock a.m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died en route by ambulance to a hospital.

VI.

The death of said William J. Aldridge was directly and proximately caused by the failure as aforesaid of defendants to provide him with safe and seaworthy conditions of work, and with a safe and seaworthy vessel, gear, equipment and place of work.

VII.

At the time of his death, said William J. Aldridge was in good health, was of the age of 52 years, had been employed as a longshoreman for approximately 30 years, was for a long time a steady member of a longshore gang and steadily employed, and was earning an average annual wage in excess of \$6,000.00.

VIII.

Plaintiff is the widow of said William J. Aldridge, having been his wife continuously since the date of their marriage on October 31, 1935; plaintiff, whose age is 55 years, was wholly dependent on her said husband for her support and maintenance; throughout the said marriage, plaintiff and her said husband had been a devoted couple, and by reason of the death of her said husband, plaintiff has been deprived of his care, comfort, love, society and support.

Plaintiff has also incurred burial and related expenses by reason of said death, and prays leave to introduce proof of the amount thereof.

Wherefore, plaintiff prays judgment against defendants and each of them, etc.

As and for a Second, Separate and Distinct Cause of Action Against Defendants and Each of Them, Plaintiff Alleges:

I.

Incorporates herein by reference as fully as though set forth at this point all of the allegations contained in Paragraphs I, II, III, V, VII and VIII of the first cause of action herein.

II.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various longshoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company, a stevedoring contractor, and by reason thereof said longshoremen, including said William J. Aldridge, were business invitees of defendants aboard said vessel.

III.

By reason of the matters and things heretofore alleged, the defendants and each of them were careless and negligent, and said carelessness and negligence directly and proximately caused the death of said William J. Aldridge as aforesaid.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$150,000.00 general damages, for burial and related ex-

penses incurred by reason of said death, for costs of suit incurred herein, and for such other and further relief as to the Court may seem just in the premises.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By RICHARD GLADSTEIN,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Plaintiff Above Named and to Messrs: Gladstein, Andersen, Leonard & Sibbett, Her Attorneys:

You and each of you will please take notice that on Monday the 15th day of April, 1957, at 10:00 a.m. or as soon thereafter as counsel can be heard, defendant, States Marine Corporation of Delaware, will move in the department of the United States District Court Judge on that day calling the Master Calendar to dismiss the action because the complaint fails to state a claim against said defendant upon which relief can be granted.

Dated: April 8, 1957.

GRAHAM, JAMES & ROLPH,
/s/ ROBERT E. PATMONT,
Attorneys for Defendant.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

This motion is made pursuant to Rules 7 (b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure. It is based upon plaintiff's failure in her complaint (1) to allege the violation of any legally cognizable duty owed by the defendant shipowner to the decedent, (2) to state a claim for recovery authorized under either the general maritime law or statute, and (3) to overcome the conclusion obvious on the face of the complaint that the death of plaintiff's decedent was not within the scope of any reasonably foreseeable risk arising out of an act or condition for which the defendant might be responsible.

I.

Plaintiff's complaint is predicated upon a shipowner's alleged duty to oversee and supervise the work of a longshoreman employed by an independent stevedoring contractor. It is necessarily so predicated because the complaint does not allege that plaintiff's decedent was killed as the result of any "operating" negligence or defect in the vessel's condition chargeable to her owners. Rather, from the face of the complaint it is apparent that plaintiff seeks recovery on the ground that the shipowner had an affirmative duty to prevent a longshoreman from selecting a method of doing his work which was obviously unsafe and calculated only to subject himself to a needless risk of serious harm.

No such duty exists. Plaintiff alleges that her decedent "was of the age of 52 years (and), had been employed as a longshoreman for approximately 30 years." This case does thus not fall under the general maritime rule that the owners of a vessel have a duty to warn and instruct a youthful and inexperienced workman, and the defendant had no duty to warn or instruct plaintiff's decedent against the obvious dangers created by his conduct.

McKenna v. Union SS Co.,
(N.D. Cal. 1914) 215 Fed. 284;

The P. P. Miller,
(W.D. N. Y. 1910) 180 Fed. 288;

The New York,
(2 Cir. 1913) 204 Fed. 764.

The duty of the shipowner to oversee and supervise cannot be found where, as here, the complaint shows that the decedent was an employee of someone else. That duty exists, if at all, only with respect to members of the crew and rests upon a master-servant relationship.

The State of Maryland,
(4 Cir. 1936) 85 F. 2d 944.

II.

Plaintiff gains nothing by designating her decedent a "seaman." As such he falls within the general maritime law that neither the shipowner nor the vessel is liable, in the absence of statute, for compensatory damages for injuries sustained by

mariners through the negligent acts of masters, officers or crew members in the giving of orders or the manner in which work is performed.

The Osceola,

(1903) 189 U. S. 158.

Nor has plaintiff stated a claim for recovery on account of "unseaworthiness." The position of plaintiff's decedent as an alleged seaman creates no greater rights based upon unseaworthiness than those accruing with respect to actual mariners.

Seas Shipping Co. v. Sieracki,

(1946) 328 U. S. 85;

Pope & Talbot v. Hawn,

(1953) 346 U. S. 406.

There is no maritime death statute protecting the widow of a deceased longshoreman or harbor worker. Absent such statute, plaintiff is within the general maritime law that confers no right whatever to recover damages or indemnity for the death of a seaman, whether occasioned by the unseaworthiness of the vessel or the negligence of the owners or members of the crew.

The Harrisburg,

(1886) 119 U. S. 199;

Lindgren v. United States,

(1930) 281 U. S. 38, 43;

Turchich v. Liberty Corp.,

(E.D. Pa. 1954) 119 F. Supp. 7, 11.

This action is presumably brought under Section 377 of the California Code of Civil Procedure. That statute permits heirs or personal representatives to maintain an action for damages for death caused by the "wrongful act or neglect" of another. It thereby confers no right of recovery based on the non-fault theory of liability for unseaworthiness.

III.

Plaintiff's complaint should be dismissed for the reason that it patently shows an absence of causal relation between the shipowner's conduct and the longshoreman's death. The defendant shipowner had no duty to warn and instruct as to the manner in which plaintiff's decedent performed his work. Even assuming the alleged failure to provide band cutters or other means for breaking the steel bands was a breach of some duty on the part of the owner, it is apparent from the complaint that the death of plaintiff's decedent resulted solely from his voluntary participation in conduct for which injury or death might reasonably be expected to result. Under such circumstances the vessel owner has no liability.

Jackson v. Pittsburgh SS Co.,
(6 Cir. 1942) 131 F. 2d 668.

The only expectable consequence of the alleged failure of the shipowner to provide some means of cutting or breaking the bands was that the longshoreman might suffer some inconvenience or delay.

Palsgraf v. Long Island RR,
(1928) 248 N.Y. 339, 162 N.E. 99.

The Palsgraf doctrine is a part of the maritime law.

Sinram v. Pennsylvania R. Co.,
(2 Cir. 1932) 61 F. 2d 767.

See also,

Pittsburgh SS Co. v. Palo,
(3 Cir. 1933) 64 F. 2d 198, 200.

For the reasons stated the complaint should be dismissed.

Respectfully submitted,

GRAHAM, JONES & ROLPH,

/s/ ROBERT E. PATMONT,

Attorneys for Defendant, States Marine Corpora-
tion of Delaware.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1957.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
FOR DAMAGES

Plaintiff complains of defendants and each of them, and for cause of action alleges:

I.

Plaintiff does not know the true names or capacities, whether individual, corporate, associate or

otherwise, of defendants sued herein under the fictitious names of White Company, a corporation, First Doe, and Second Doe, and plaintiff prays leave to amend this complaint and insert herein said true names and capacities when the same shall have been ascertained.

II.

Plaintiff is informed and believes and therefore alleges that each and all of the defendants are corporations organized and existing under and by virtue of the laws of states other than the State of California, but that said corporations have qualified to do, and are doing, business in the State of California, and maintain principal offices and places of business therein, and particularly in the City and County of San Francisco.

III.

At all times herein mentioned the defendants did and now do own, operate, control and maintain the American vessel S.S. Lone Star State.

IV.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various long-shoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company to perform said work; that while and during the time said William J. Aldridge was

performing said work aboard said vessel, he occupied the position of a seaman in that he was performing work traditionally of a seaman's character, and by reason thereof the defendants did owe to him the duty of ordinary care and the duty to furnish and supply adequate and safe tools for the performance of his work and a reasonably safe place in which to work.

V.

Said William J. Aldridge did commence work as a longshoreman as aforesaid at approximately 7:00 o'clock p.m. of said day, and did continue his said work until approximately 2:00 o'clock a.m. thereafter; said work was performed in the No. 3 hold aft of said vessel; during the course of said work it was necessary from time to time for dunnage to be used therein, and for that purpose loads of dunnage, each weighing between one and two tons, consisting of large pieces of lumber of varying sizes and weights, strapped together by metal bands, were lowered into the said hold of said vessel; that at and shortly after the commencement of said work at approximately 7 o'clock p.m. of said day, the said William J. Aldridge and other longshoremen working together with him did request that they be supplied with band cutters or other means for breaking the said steel bands in order to free the pieces of dunnage so that said longshoremen could perform their tasks and duties in connection therewith, and said request was thereupon communicated to the defendants, including but not limited to the Port

Captain employed by, and an officer of, said defendants, and a carpenter boss, likewise employed by the defendants; the defendants by and through their said agents, officers and employees did advise that no band cutters or other means or methods were available for cutting or breaking the said steel bands, but did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and method provided by defendants to free said dunnage during the early portion of said work; that thereafter, when it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by said longshoremen were made through their foreman, supervisor and walking boss, but the defendants did negligently and carelessly fail to respond and did negligently and carelessly fail to provide or supply either persons or proper means by which the said bands could be cut or broken, and by reason thereof the only means and method remaining to said longshoremen by which such steel bands could be broken, was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the aforesaid it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period of several hours, during all of which the defendants negligently and

carelessly failed to supply any band cutters, or any persons to cut or break said bands, and in the course of such operations, at approximately 1:55 o'clock a.m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died en route by ambulance to a hospital.

VI.

The death of said William J. Aldridge was directly and proximately caused by the aforesaid carelessness and negligence of defendants.

VII.

At the time of his death, said William J. Aldridge was in good health, was of the age of 52 years, had been employed as a longshoreman for approximately 30 years, was for a long time a steady member of a longshore gang and steadily employed, and was earning an average annual wage in excess of \$6,000.00.

VIII.

Plaintiff is the widow of said William J. Aldridge, having been his wife continuously since the date of their marriage on October 31, 1935; plaintiff, whose age is 55 years, was wholly dependent on her said husband for her support and maintenance; throughout the said marriage, plaintiff and her said husband had been a devoted couple, and by reason of the death of her said husband, plaintiff has been

deprived of his care, comfort, love, society and support.

Plaintiff has also incurred burial and related expenses by reason of said death, and prays leave to introduce proof of the amount thereof.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$150,000.00 general damages, for burial and related expenses incurred by reason of said death, for costs of suit incurred herein, and for such other and further relief as to the Court may seem just in the premises.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ RICHARD GLADSTEIN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 1, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Plaintiff Above Named and Messrs. Gladstein,
Andersen, Leonard & Sibbett, Her Attorneys:

You and each of you will please take notice that on Monday the 27th day of May, 1957, at 9:30 a.m. or as soon thereafter as counsel can be heard, defendant States Marine Corporation of Delaware will

move the above-entitled court in the court room of the Master Calendar Judge, to dismiss plaintiff's First Amended Complaint on file herein on the ground that it fails to state a claim against said defendant upon which relief can be granted.

Dated: May 14, 1957.

GRAHAM, JAMES & ROLPH,
/s/ ROBERT E. PATMONT,
Attorneys for Defendant.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM IN SUP-
PORT OF MOTION TO DISMISS

Plaintiff's First Amended Complaint is based solely on negligence. It is nevertheless still subject to the motion to dismiss heretofore made by the defendant shipowner and now renewed. The amended complaint should be dismissed because it fails to allege facts sufficient to show the violation of any duty owed by the shipowner to the deceased longshoreman. Even if negligence on the part of the shipowner were assumed, it is apparent on the amended complaint that as a matter of law no causal connection would exist between the death of plaintiff's decedent and the shipowner's alleged negligence.

The alleged fault of defendant shipowner is its asserted failure to provide band cutters or some other means to break the metal bands strapped

around a load of dunnage. A complaint predicated on the existence of such a duty wholly misconstrues the nature of the relation between a vessel and those who perform the work of loading and unloading her cargo pursuant to an independent contract. The maritime law imposes no liability upon a vessel or her owners for the failure to provide implements which by their very nature are not part of the ship's equipment, tackle and machinery but are instead implements which are peculiar to the loading and unloading work of which the stevedores are in control.

Signore vs. S.S. Ferngulf

(SDNY 1952) 103 F. Supp. 677;

Riley, ADMX. vs. Agwilines,

Inc. (1947) 296 NY 402, 1947 AMC 1038.

The amended complaint shows that plaintiff's decedent was employed as a longshoreman by the Schirmer Stevedoring Company, an independent stevedore. Defendant's duty to provide plaintiff's decedent with a reasonably safe place to work did not, in the absence of a specific agreement, extend to the provision of band cutters for the use of the longshoremen in breaking the dunnage straps or in any other way to supervision of the manner in which this operation was performed. That operation was part of the business of loading and unloading the vessel and as such was the business of the stevedoring company. The amended complaint is therefore void of allegations showing breach of duty or negligence.

The amended complaint is subject to dismissal even though it is assumed that the shipowner was negligent. Recovery based upon negligence will not be allowed against the shipowner in maritime cases unless its conduct is the "proximate cause" of the harm in question.

Hawley vs. Alaska S.S. Co.

(9 Cir. 1956) 236 F. 2d 307.

Following the doctrine of *Palsgraf vs. Long Island R.R.* (1928) 248 NY 339, 162 NE 99, it is recognized in cases of this kind that liability attaches only if the injury or death may reasonably have been expected to follow from the defendant's negligent act or omission. Recovery is denied where the damage complained of is not within the scope of any reasonably foreseeable risks created by the conduct of one against whom liability is sought.

Sinram vs. Pennsylvania R. Co.

(2 Cir. 1932) 61 F. 2d 767;

See also,

Pittsburgh S.S. Co. vs. Palo

(3 Cir. 1933) 64 F. 2d 198, 200.

If in fact the shipowner was negligent in failing to provide band cutters, the risks created by such negligence fall far short of including a longshoreman's death. The risk was only that the longshoremen might suffer some inconvenience or delay in finding another safe way to do their job. In such circumstances the shipowner would be responsible

for any losses occasioned by the delay. But this could not mean that the shipowner should have foreseen, and be thus accountable for, the death of plaintiff's decedent. His death occurred not because there were no band cutters, but because the longshoremen chose to shortcut their own safety to perform their work in an obviously foolhardy manner.

Vileski v. Pacific-Atlantic SS Co.

(9 Cir. 1947) 163 F. 2nd 553.

What caused the death is apparent on the amended complaint. Plaintiff alleges that her decedent was killed by falling dunnage when he and other members of his longshore gang undertook to break the metal bands strapped around a load of dunnage by placing a cargo hook in the bands and raising the load into the air. Raising a load of dunnage weighing between one and two tons by means of straps which the longshoremen knew—indeed intended—would break, was an improper, careless, and dangerous use of the ship's gear for which its owners are not liable.

Freitas v. Pacific-Atlantic SS Company

(9 Cir. 1955) 218 F. 2nd 562;

The Daisy

(9 Cir. 1922) 282 Fed. 261.

The voluntary participation by plaintiff's decedent in this method of breaking the dunnage straps was the sole cause of his death. By his own volition he created a condition from which injury or death could reasonably be expected to result. It

is beyond the breadth of reasonableness that a ship-owner who, albeit negligently, fails to provide band cutters should be liable for the consequences of an alternative method of breaking the bands which plaintiff's decedent chose in reckless disregard of his own safety.

Jackson v. Pittsburgh SS Co.

(6 Cir. 1942) 131 F. 2d 668.

The facts of the Jackson case, *supra*, are parallel to these. There the court affirmed an order dismissing the complaint for failure to state a justiciable claim against the defendant in either of two causes of action. The complaint alleged that the plaintiff was injured when he jumped about six feet from the deck of the vessel to the dock. Plaintiff alleged that there was no ladder nor other means of egress from the ship; that he requested a member of the crew to place a ladder over the side so that he might go ashore; and that this request was refused. In a *per curiam* opinion the court said (131 F. 2d @ 669, 670):

“Assuming that the failure of the ship to provide a ladder at the time and place indicated was a breach of duty on the part of the owners and therefore, negligence, we are unable to perceive that such negligence bore any causal relation to the injuries of the plaintiff which followed. The court was right in dismissing the first cause of action.” (For negligence.)

“The plaintiff was not compelled to jump from the ship. The only expectable injury that he might have suffered from the failure to provide a ladder, would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured in the service of the ship. The court was likewise right in dismissing the second cause of action.” (For maintenance and cure.)

Plaintiff's position is no more favorable than that of the seaman plaintiff in the Jackson case. On the authority of that case, and for the reasons herein stated, plaintiff's first amended complaint should be dismissed.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,

/s/ ROBERT E. PATMONT.

Certificate of service by mail attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

The allegations of the amended complaint herein may be summarized as follows:

Plaintiff's decedent was a longshoreman who, on October 25, 1956, was employed in that capacity aboard the SS Lone Star State. Decedent and his fellow longshoremen were engaged in loading cargo into the holds of the vessel, the particular cargo being loaded requiring large quantities of dunnage. The dunnage was brought aboard said vessel by the longshoremen in large bales held together with steel straps. Shortly after the longshoremen commenced work in the morning, they requested the agents and employees of defendant to either supply them with a band cutter, or that they send a ship's carpenter into the hold of the vessel to break or cut the bands. Pursuant to this request, the ship's carpenter was sent into the hold for that purpose for the first few hours of the day's work. However, later on in the day it again became necessary to break the bands holding together a bale of dunnage, but despite request made to the agents and employees of the defendant, they failed and neglected to again send the ship's carpenter into the hold or to furnish a band cutter for the use of the longshoremen. Because of such failure and neglect on the part of the defendant, the longshoremen were compelled to devise their own means of breaking said bales of dunnage

and in doing so the decedent was struck by pieces of dunnage and killed.

The complaint further alleges that the death of decedent was directly and proximately caused by the negligence and carelessness of the defendants in failing and neglecting to furnish a band cutter for the use of the longshoremen, or, in the alternative, in failing to dispatch a ship's carpenter into the hold to break the steel straps containing said dunnage.

The defendant in its motion to dismiss makes the following contentions:

(1) That there was no obligation on the part of the shipowner to furnish the tools in question.

(2) That even if they were negligent in not so doing, that proximate cause is lacking; in other words, that the death of the longshoreman in this particular case was not reasonably foreseeable by the shipowner; that the acts of the longshoremen of themselves broke whatever chain of causation there might have been between the alleged negligence of the shipowner and the death of decedent.

The difficulty with defendant's argument is that while it might be persuasive on a motion to dismiss made at the close of plaintiff's case at trial, it cannot be made on a motion to dismiss on the pleadings. At this stage of the proceedings all of the elements of plaintiff's complaint must be deemed admitted, including the allegation mentioned above (Par. VI of the complaint) reading as follows:

“The death of said William J. Aldridge was directly and proximately caused by the afore-said carelessness and negligence of defendants.”

At the close of plaintiff's case the trial court may feel that plaintiff has failed to establish (1) that by custom and practice in Pacific Coast ports it was the obligation of the shipowner, and not the stevedores, to furnish proper tools, or in the alternative, a ship's carpenter, to break down these bales of dunnage; or (2) that even though there was such an obligation, the death of plaintiff's decedent could not have been reasonably foreseen by the shipowner as a possible result of a breach of said obligation.

In *Cook v. Maier*, 33 C.A. 2d 581, at page 583, the Court stated:

“It is the rule that the natural and probable consequences of a negligent act or omission are those which should reasonably have been anticipated, but it is sufficient to plead negligence generally, and whether or not the negligence pleaded and the results therefrom are true are questions of fact which cannot be determined upon demurrer.”

Under law, therefore, it is sufficient as a matter of pleading to allege a causal connection between the alleged negligence and the injury. Whether such is the fact or not cannot be raised by way of demurrer or motion to dismiss, but must be determined at time of trial.

It is respectfully submitted, therefore, that plaintiff's motion to dismiss should be denied.

Dated: May 31, 1957.

Respectfully submitted,

GLADSTEIN, ANDERSON,
LEONARD & SIBBETT,

By /s/ EWING SIBBETT,
Attorneys for Plaintiff.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

DEFENDANT'S CLOSING MEMORANDUM

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss suggests no new theory upon which relief can be granted but urges that defendant's remedy is by a motion for non-suit rather than a motion to dismiss.

In the U. S. District Court's practice under the Federal Rules of Civil Procedure where, as here, it appears from the allegations of the complaint that the asserted negligence was not the proximate cause of the alleged injury the proper remedy is a Motion to Dismiss under FRCP 12(b)(6):

Shelaeff v. Groves

(USDC ND Cal. SD, Judge St. Sure 1939)
27 F. Supp. 1018 @ 1020.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,

/s/ ROBERT E. PATMONT,

Attorneys for Defendant.

Dated: June 3, 1957.

Certificate of service by mail attached.

[Endorsed]: Filed June 7, 1957.

In the United States District Court for the Northern District of California, Southern Division

No. 36315

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation; et al.,

Defendants.

ORDER

Defendant States Marine Corporation has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Assuming arguendo that the shipowner had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the

breach of this duty was not the proximate cause of decedent's death.

Accordingly, defendant's motion is granted and the complaint is dismissed.

It Is So Ordered.

Dated: July 2nd, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 2, 1957.

[Title of District Court and Cause.]

MOTION TO RECONSIDER AND VACATE
AND SET ASIDE ORDER OF DISMISSAL
AND TO PERMIT THE FILING OF A
SECOND AMENDED COMPLAINT

To the Defendants Above Named, and to Messrs.
Graham, James & Rolph, Their Attorneys:

You and Each of You Will Please Take Notice that on Tuesday, July 23, 1957, at the hour of 9:00 a.m. of said day, plaintiff will move the Honorable Edward P. Murphy, in his Court Room, Post Office Building, 7th and Mission Streets, San Francisco, California, for an order setting aside his order of dismissal of plaintiff's complaint heretofore made, and to permit plaintiff to file a second amended complaint herein.

Said motion will be made upon all of the papers and records in this action, and upon the grounds that there are facts present in this case which if alleged would state a cause of action against defendants and that in the interests of justice plaintiff should be permitted to amend her first amended complaint to set forth said facts.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,
Attorneys for Plaintiff.

Memorandum of Points and Authorities: F. R. C. P. Rule 15(a); *Ferguson v. Moore-McCormack Lines*, 1 L. Ed. 2d 512.

Receipt of copy acknowledged.

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

ORDER

In the above-entitled matter plaintiff has moved this court for an order setting aside its order of dismissal of plaintiff's complaint, and to permit plaintiff to file a second amended complaint.

This motion was argued orally and submitted.

I can find no valid reason for vacating the order dismissing the complaint heretofore made on July 2, 1957.

Accordingly, plaintiff's motion is hereby denied and it is so ordered.

Dated: July 25th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 25, 1957.

[Title of Court of Appeals and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

You Are Hereby Notified that the plaintiff herein does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain order of dismissal entered herein on July 2, 1957, and from that certain order entered herein on July 25, 1957, denying plaintiff's motion to vacate and set aside said order dated July 2, 1957.

Dated: July 29, 1957.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,
Attorneys for Plaintiff.

[Endorsed]: Filed July 30, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court, City and County of San Francisco, with copy of Complaint.

Bond on Removal.

Notice by Defendant of Motion to Dismiss With Supporting Memo.

First Amended Complaint.

Memorandum of Plaintiff in Opposition to Motion to Dismiss.

Closing Memorandum of Defendant.

Order Granting Motion of Defendant to Dismiss.

Motion of Plaintiff to Reconsider and Vacate Order of Dismissal.

Order Denying Motion to Reconsider.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

Appellee's Designation of Record on Appeal.

Reporter's Transcript of Excerpts From Record on Appeal, April 29, May 27 and July 25, 1957.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of August, 1957.

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes the supplemental record on appeal herein as designated by counsel for the appellee:

Notice and Motion by Defendant to dismiss, with supporting memo.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 4th day of September, 1957.

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

EXCERPTS ON APPEAL

Monday, April 29, 1957

The Clerk: Aldridge versus States Marine Corporation.

Mr. Patmont: Ready for the defendant, your Honor.

Plaintiff's counsel advises me that he is going to file an amended complaint. Could we have that motion taken off calendar pending——

The Court: The current motion?

Mr. Patmont: The current motion. I may want to renew it when there is an amended complaint.

The Court: That is the Aldridge case?

Mr. Patmont: The Aldridge case.

The Court: Off calendar.

Monday, May 27, 1957

Before Hon: Edward P. Murphy.

The Clerk: Aldridge versus States Marine Corporation, Motion to Dismiss Plaintiff's First Amended Complaint.

Mr. Patmont: If your Honor please, this is an action brought by the widow of a longshoreman to recover damages for his death. The action was originally filed in the superior court and was removed here, and the defendant, States Marine Corporation, filed a motion to dismiss the original complaint, which motion was ordered off calendar when we learned that the plaintiff was to file a first amended complaint. We have a memorandum in support of the original motion to dismiss, which does in some respects relate to our motion now, which is to dismiss the first amended complaint. We have also filed a supplemental memorandum in support of this motion, which largely takes care of our argument; but I point out that there is another memorandum, if your Honor is reading through the file. We would appreciate it if both of them would be read.

Basically, the first amended complaint is one for negligence against the shipowner, and it seeks to recover damages for the death of a longshoreman which occurred when he and fellow members of his longshore gang were lifting up loads of dunnage by means of a cargo hook on the end of a winch, with a hook wrapped in the metal straps of the dunnage and raised up; and that in order to break these metal straps——

The Court: I know. And then he was hit by a piece of lumber falling out of the dunnage.

Mr. Sibbett: That's right, that's exactly what happened; or he was hit by the entire load of dunnage.

The Court: Now your point is that the owner of the vessel has no duty to furnish longshoremen with means to do their loading and unloading, is that right?

Mr. Patmont: That's right, your Honor.

The Court: And you also contend that even if there were such duty, failure to furnish tools for breaking this particular strapping which you have referred to was not the proximate cause of the accident?

Mr. Patmont: That's correct, your Honor.

The Court: And your third ground is that this longshoreman's death as it occurred was not within the foreseeable risk of the failure to furnish tools for breaking this type of——

Mr. Patmont: That is exactly our argument, your Honor.

The Court: Now, unless, Mr. Sibbett, you are in a position to come forward with some doctrine of liability which is not based upon negligence, I would be inclined to grant this motion. That is just my preliminary thinking.

Mr. Sibbett: Yes, your Honor; and I haven't had a chance to reply to the memorandum that has been on file, and I would like an opportunity to do that. However, the position I take in this matter is that the argument which is being made here might very properly be made at the end of the plaintiff's case, but we will show, or at least attempt to show, that by custom and practice in Pacific Coast ports and on the Pacific Coast, the longshoremen are not carpenters; they are not hired when they are han-

dling dunnage, it is not their job to take straps off. They use the dunnage in loading the ship and placing the cargo in its proper place.

The Court: Are you contending in any way that there is a cause of action here for unseaworthiness?

Mr. Sibbett: No, your Honor, because that has already been decided by your Honor and a number of other courts, that in a death action, we have the anomalous situation where a longshoreman's widow is not entitled to benefits of the doctrine of unseaworthiness.

The Court: Well, in any event, do you want time to reply to this memorandum?

Mr. Sibbett: I do, yes.

The Court: How much time?

Mr. Sibbett: Could we submit it next Monday with a memorandum? I will file it in the meantime.

The Court: Satisfactory?

Mr. Patmont: That will be satisfactory, your Honor. Possibly I would like one or two days to reply.

The Court: If you think it necessary.

Mr. Patmont: If I think it is necessary.

The Court: All right. You already have my preliminary thinking in the matter.

Mr. Sibbett: Yes.

The Court: You may have not more than two days.

Mr. Patmont: All right; thank you, your Honor.

The Court: Next Monday.

MOTION TO VACATE

July 25, 1957

The Clerk: Aldridge vs. States Marine Corporation, Motion to Reconsider, Vacate and Set Aside Order of Dismissal.

Mr. Gladstein: Ready, your Honor.

May it please the Court, this is an application for reconsideration of an Order made by this Court earlier this month, and a request that such Order be set aside, that it be held that the amended complaint does state a cause of action and that the defendant be required to answer.

The Order which your Honor entered in July says, in effect, that assuming the shipowner had a duty to the stevedores to furnish means with which to break certain strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of the decedent's death.

I am going to argue, your Honor, that probably because of our failure to direct the Court's attention to a recent decision of the Supreme Court of the United States, which I think is dispositive, this order was improvident. The amended complaint alleges, your Honor, that Aldridge, who was killed in this action, his wife brings this action for damages for wrongful death, went to work at 7:00 o'clock p.m. on the ship, and that he was killed about 1:00 o'clock in the morning, having worked some five or six hours; indeed, we say that he was

killed at approximately 1:55 a.m., so he had been there for almost seven hours.

During the course of the evening in performing the work, the longshoremen required dunnage, which, as your Honor knows, is sticks or pieces of lumber of varying sizes and length which are used to assist in stowage to create flooring and to act as wedging for cargo.

We allege on page 2 that in the early portion of the evening, when the dunnage was lowered into the hold, it was discovered that there were no snippers or cutters or shears that might be used to cut or sever the bands of steel which were around the piles of dunnage. I could describe those by analogy as something like a group of pickets, or a picket fence with a band of steel around each end.

We allege that ordinarily such means are provided by the ship or by the stevedoring company, and that when it was discovered early in the evening that there was no such means, requests were made by the longshoremen in this particular hold, including the decedent in this case, for assistance.

We allege that when this request was communicated to the defendant ship-owning company, including, as we say, its port captain who was there, and a carpenter, a ship's carpenter, an employee of the shipping company, that they did at various times come down into the hold equipped with hammers for the purpose of breaking these bands, and they did this from time to time.

The Court: Were they of the claw hammer type or variety?

Mr. Gladstein: I would assume so, although I do not know exactly what the hammer was. But it would be the kind of hammer that would enable, the use of which would enable a carpenter to break this band of steel which is—it's like a strap, usually about——

The Court: I know; I am familiar with it, but that would require the claw type of hammer in order to wedge it under there and break the strap-ping.

Mr. Gladstein: I would think so.

The Court: That's an important thing, the character of the hammer.

Mr. Gladstein: Well, we do allege here that the company itself, the shipping company, did send a carpenter down and that he did, in the early portion of the evening, with hammers, with equipment, break the bands. You see, we said: "But did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and methods provided by the defendants to free said dunnage during the early portion of the work."

Thereafter we say it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by the longshoremen were made through their foreman, their supervisor and their walking boss, but by that time the defendants did negligently and carelessly fail to respond, did negligently and carelessly fail to provide or supply either persons or proper means by which the said bands could be cut or broken, and

by reason thereof the only means or methods remaining to the longshoremen by which these bands could be broken was to employ the hook of the winch. And this is a method which the proof at the trial would show is used, although it has inherent risks, but it is used and it is known by the shipping companies to be used when no means are supplied.

And what happens is that the hook of the winch falls is hooked into one of the bands and then the winch driver raises the falls and thereby raises the dunnage, and by means of jiggling and bouncing the dunnage up and down against the floor, breaks the band forcibly; the risk, of course, being that the dunnage falls apart suddenly and there is danger of somebody being hurt.

But the proof would show that this defendant knows and knew and by the exercise of reasonable care should have known and could have known that when longshoremen are not supplied with either a carpenter with a claw hammer or some kind of hammer, or with shears or scissors of some kind, snippers, that would cut these bands, there is no other method to which they can resort except that one.

Now, there is a notion prevalent that whenever a condition of that kind occurs, longshoremen ought to leave the work and walk off the ship. That notion is a fallacious one; it happens very, very seldom, and the records recently announced by the Pacific Maritime Association as to the fact that last year's loading operations in this city were the highest in the history of this city indicate that the men stay

on the job and do the best they can with what they have.

So we allege that after these calls in this hold by the decedent and his fellow workmen went unheeded, the port captain didn't come, the carpenter wasn't there, the claw hammers or other hammers werent' left there for them, there were no shears, they did resort, we say, to the only thing that was left to them, by raising the dunnage into the air and causing the weight thereof to break the straps. In the process of this being done, the dunnage fell in such a manner that one or more of the boards fell upon Mr. Aldridge and instantly inflicted upon him fatal injuries.

Now, your Honor's order was based on the theory, as I see it, that there was a lack of proximate cause because, if I understand the reasoning, it couldn't be said that the shipping company could reasonably foresee that if the shipping company failed to supply proper hammers or proper equipment, proper shears—well, that the men would resort to this. But I think that is a fact question to be decided on the evidence, and I believe, your Honor, that a strong analogy is to be found in the recent decision of the Supreme Court in *Ferguson against Moore-McCormack Lines*. I have the advance sheet. It is one Lawyer's Addition No. 7, and it is to be found at page 512.

This was a decision written by Mr. Justice Douglas, which was joined in the opinion by the Chief Justice, Mr. Justice Clark, Mr. Justice Brennan, Mr. Justice Burton concurred in the result; Mr.

Justice Reed and Mr. Justice Frankfurter and Harlan dissented and Mr. Justice Black took no part in the decision, so it was, in effect, a five-to-three decision. Now, here is what happened in that case. It involved a seaman, but as your Honor well knows, and no citation of authority is necessary on this, when a longshoreman goes aboard a ship and performs work which is traditionally that of seamen in the old, old days, he is to be treated as and equated as a seaman.

In this case the man was hurt in 1950 while serving as a second baker on the respondent's passenger ship Brazil.

“Among his duties, he was required to fill orders of the ship's waiters for ice cream. On the day of the accident, he had received an order from a ship's waiter for 12 portions of ice cream. When he got half way down in the 2½-gallon ice cream container from which he was filling these orders, the ice cream was so hard that it could not be removed with the * * *” scoop with which he had been provided.

“Petitioner undertook to remove the ice cream with a sharp butcher knife kept nearby, grasping the handle and chipping at the hard ice cream. The knife struck a spot in the ice cream which was so hard that his hand slipped down onto the blade of the knife, * * *” and he lost two fingers.

Now, at the trial it was held, that is, at the trial it was contended by the defendant, the shipping

company, that it could not be held legally responsible for having at all foreseen the possibility that this man, even if he didn't have the right implement, would actually take such a thing as a butcher knife and use it with its obvious dangers. The trial court permitted the case to go to the jury and the jury found from the evidence a verdict in favor of the plaintiff for \$17,500.00, which verdict was appealed to the Court of Appeals.

The Court of Appeals, with Judge Medina writing the decision, reversed, holding, and I quote from the opinion:

“It was not within the realm of reasonable foreseeability that petitioner would use the knife to chip the frozen ice cream.”

In other words, that there was no proximate cause between the negligence of the ship in failing to supply a proper scoop and this man's injury.

The Supreme Court said: “We conclude that there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task.”

And in part of it they say: “Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases * * * could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident.

The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fairminded men could conclude that respondent should have foreseen that petitioner might be tempted to use the knife to perform his task with dispatch, since no adequate implement was furnished him."

"Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act * * * what we said in *Rogers against Missouri Pacific*, is relevant here:

" 'Under this statute the test of a jury case is simply whether the proofs justify with reason (an inference) that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' "

Now, the Supreme Court reinstated the judgment in favor—the judgment and verdict in favor of the plaintiff. Now, your Honor, we have that case here with this difference. I think our case is stronger. The proofs would show here, different from the case from which I have just read, that many times in the history of longshore operations this company and other companies know that longshoremen do resort—they feel compelled to resort—to this same method, risky though it is, of breaking the dunnage in order to enable them to get on with the work, and that, therefore, there is even stronger basis for holding that the jury could say they could have foreseen.

Your Honor decided this in such a way that un-

less the order is vacated by August 2, any right of ours to appeal would be lost. But I would like to ask your Honor to do what your Honor did recently in a case quite different, I know, in which your Honor said that if it becomes the view of a judge of this court that the ruling he has made is in error, the judge ought to have the courage to say so and not require a party litigant to go to the Court of Appeals. I submit, your Honor, that this Order of the Court was improvident, should be vacated, and the defendant should be required to answer our complaint.

Mr. Patmont: Your Honor please, the motion addressed to the Court and by the plaintiffs in this action recites that there are facts present in this case which, if alleged, would state a cause of action against the defendants and that in the interests of justice plaintiff should be permitted to file what would in effect be her third complaint.

We have heard no suggestion, nor is there any suggestion in the motion as to what the additional facts would be permitting an amendment of the complaint, or which would state a cause of action in a second amended complaint, and we believe, therefore, that the purpose of this motion has been simply to attempt to get an extension, if possible, or a tolling of the time within which plaintiffs would have to appeal.

The steps heretofore taken by the plaintiff in this case have been free, calculated and deliberate. They have had an opportunity to brief and draft two complaints, argue before this Court as to any

theory they may have had on the proximate cause question, the Court has considered a memorandum filed by us on both—two memoranda, one on the original complaint and one on the first amended complaint, having to do with the question of causation and foreseeability.

We do not believe that the motion is well taken insofar as it purports to say that there are facts which, if alleged, would state a cause of action, because we haven't heard any facts, nor have we had any indication of what a third complaint in this case would look like.

Now, with respect to the Ferguson case which has been urged this morning as dispositive of this case, we submit that that case makes no change in any applicable law, nor does it affect nor should it affect the ruling of the Court heretofore made in granting the motion to dismiss.

That case, which was under the Jones Act (this case is, first, not under the Jones Act), had as a key to it, we submit, a finding by the Court that the seaman there who was using the knife as an ice pick was ordered under penalty, I suppose, of discharge by his employer, who was ordered by the employer who had control over the work, the work he did and the manner in which he did it, to serve and serve fast seven or twelve scoopings of ice cream, the Court saying in that case that there was evidence that petitioner had been instructed to give the waiters prompt service, that the ice cream was terrifically hard. We think that the fact that the plaintiff in that case was required by the shipowner,

as its employee, to fill the orders for ice cream under instructions to give prompt service, created a relationship between him and his employer which does not exist between the shipowner and the plaintiff decedent in this case.

Here we don't have a situation of a man doing work where the shipowner has any control over the manner in which he does his work, or cannot control, has no supervision over him or can't tell him how or how not to do his work.

In this connection we would cite to your Honor a decision of the Second Circuit, *Berti vs. Compagnie de Navigation Cyprien Fabre*, 213 Fed. 2d 397, the Court there holding, in 1954, that the shipowner has no duty that requires stevedores to stop doing work in an unsafe manner, has no duty to supervise it, has no control; the stevedore is employed by an independent contractor and the manner in which the stevedore performs his work and the supervision of that work is between the stevedore, the longshoreman and his boss, the shipowner having no control.

We think, therefore, that the Ferguson opinion which rests, as it does, on a finding of the Supreme Court, of the control over the seamen by the shipowner, the fact that they told him to do the work and told him to do it fast makes that case a little bit different than what we have here.

The Court: They did not tell him to use the butcher knife specifically, did they?

Mr. Patmont: No; but they didn't give him any other tool; they gave him the ice cream hard and

they told him to serve it up fast. This was his boss talking to him, in effect, saying here's the job, do it fast, do it with what you've got, and we submit are responsible for the manner in which he did that work much more so than the shipowner can be responsible in the case of a stevedore who is employed by an independent contractor.

In this connection, your Honor, we would point out that the first complaint filed by the plaintiffs in this case did allege that the shipowner had a duty to supervise and oversee the work of this longshoreman and prevent him from killing himself. We filed a motion to dismiss directed to that argument, in part, and in the original memorandum we have in support of our motion to dismiss there are cases cited which clearly negate any argument the shipowner has a duty to supervise and oversee. The shipowner, once again we point out, has no control over the manner in which the longshoreman does his work, and if the longshoreman is killed as the result of the manner in which he performs his work, that is not the shipowner's responsibility.

Any other construction of the Ferguson case would simply mean that any question of causation is a jury question and we submit here that that is obviously ridiculous. There are questions of causation that are obviously beyond a jury's province.

The question of causation, as has been decided also by the Second Circuit in an opinion after the Ferguson case—I will give you that citation—Gwinett vs. Albatross, another Second Circuit case, 243 Fed. 2d 8. This case is after the Ferguson case

and states the question of liability in negligence cases still depends upon the foreseeability of harm, that the Ferguson case has not changed that rule, that the only thing is that in the Ferguson facts the question of control over the manner in which the plaintiff did his work was much more closely connected to the shipowner than it is in this case.

The controlling fact in this case, your Honor, and it has been brought out in cases already cited and discussed in the memoranda filed heretofore, is the fact that the plaintiff decedent in this action himself did a reckless thing in standing under a load of dunnage which, as alleged in the complaint, weighs between one and two tons, which he knew and, indeed, expected would fall.

In that case it is the clearest instance you can have of an independent foolhardy act breaking a chain of causation. Under no construction can it be said that it is within the realm of reasonable foreseeability, the rule that applies in all of these cases, that a man standing under one or two tons of lumber that he expects will fall and lifts up for the purpose of having it fall, can't complain of anything other than his own foolish act.

We submit, your Honor, once again that all of the questions in this case have been discussed. The plaintiff has had two bites of the apple, now he wants a third. It is obvious that there is no amendment of the complaint, as the plaintiff alleges, or states in its motion that can be made, without trifling with the facts. We would point out the

language of Judge Goodman in the Battat case, 56 Fed. Sup. 967 at page 969 where he says:

“Inasmuch as it is clear that the libelant cannot state a cause of action in either count”—there were two counts in that case—“without trifling with the facts, the exceptions to both counts should be and are sustained without leave to amend.”

Similarly in *Grace against Ford Motor Company*, the Ninth Circuit, 278 Fed. 955, the Court said:

“The difficulty which confronts the appellant is not a defect in its pleading, but the nature of the facts which have been disclosed.”

We say here that the only problem facing the plaintiff in this case is that in its two complaints, and there have been two complaints heretofore filed, one of which was voluntarily amended, the other of which was dismissed, both of which were subject to motion to dismiss made by us, that it is obvious from the extent and completeness of the facts alleged what caused the injury and how the question of proximate cause had to be applied.

We say simply, then, that the ruling heretofore made was correct, there is really nothing new, the Ferguson case doesn't change anything, and that your Honor's ruling should stand.

The Court: May the matter be submitted?

Mr. Gladstein: Yes, your Honor, it may be submitted.

[Endorsed]: Filed August 16, 1957.

[Endorsed]: No. 15698. United States Court of Appeals for the Ninth Circuit. Armida Aldridge, Appellant, vs. States Marine Corporation of Delaware, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 29, 1957.

Docketed September 6, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15698

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
HER APPEAL

Comes now appellant and hereby, pursuant to Rule 17(6), states the points upon which she intends to rely on her appeal, namely:

1. The Order of the District Court Judge of July 2, 1957, dismissing the within action, and his Order of July 25, 1957, denying plaintiff's motion to reconsider and vacate and set aside order of dismissal and to permit the filing of a second amended complaint, are contrary to law.

2. The said Orders unconstitutionally deprive appellant of her right to a jury trial.

Dated: September 4, 1957.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,

Attorneys for Appellant.

[Endorsed]: Filed September 6, 1957.